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In the Supreme Court

of the

United States

October Term, 1931

No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,

Petitioner;

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals

for the Ninth Circuit

and

BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioner above named hereby petitions said Court for a writ of certiorari to be directed to the Circuit Court of Appeals for the Ninth Circuit to bring before this Honorable Court the case pending

therein, and entitled: J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, Deceased, Petitioner, v. Commissioner of Internal Revenue, Respondent, No. 6489, and in support of said petition respectfully shows:

1.

The case above referred to was brought before the Circuit Court of Appeals for the Ninth Circuit for review of a decision of the United States Board of Tax Appeals upon petition of J. H. Gwinn, beneficiary of the estate of M. A. Gwinn, deceased.

2.

The case above referred to was argued in the Circuit Court of Appeals for the Ninth Circuit and was finally decided by said Court on the 5th day of January, 1932.

3.

The Circuit Court of Appeals for the Ninth Circuit affirmed the order of the Board of Tax Appeals upholding a proposed assessment of estate tax against the petitioner as beneficiary of the property of the estate of M. A. Gwinn, deceased.

4.

The Circuit Court of Appeals for the Ninth Circuit on February 23, 1932, denied a petition for a rehearing on behalf of petitioner. (Tr. 41.)

QUESTION PRESENTED.

Whether, in computing the Federal estate tax of decedent, a resident of the State of California, who died October 5, 1924, (which tax was consequently governed by Section 302 of the Revenue Act of 1924) the Commissioner was justified in including in the gross estate one half of the value of certain property located in the State of California which was held by decedent and her son, the petitioner, as joint tenants with right of survivorship under a joint tenancy created in June, 1915.

REASONS FOR GRANTING THE PETITION.

1. The Circuit Court of Appeals erred in sustaining the decision of the Board of Tax Appeals, that the value of decedent's interest in property owned by decedent and petitioner as joint tenants with the right of survivorship since June, 1915, the date on which the joint tenancy was created, must be included in her gross estate for the purpose of estate tax under the Revenue Act of 1924.

2. The point of law in this case is the same as the question of law decided by the Circuit Court of Appeals for the Ninth Circuit in the case of *Carter v. English,* 15 Fed. (2d) 6. Here we have a different answer to the same question of law.

3. The Circuit Court of Appeals erred in not following *Carter v. English,* supra. *Carter v. English* took as a ground of decision that the California Supreme Court had, in *Estate of Gurnsey,* 177 Cal.

211, held that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the enactment of the law.

4. The decision of the Circuit Court of Appeals is not in harmony with the rulings of this Court in the case of *Tyler v. U. S.*, 281 U. S. 497, and *Phillips v. Dime Trust and Safe Deposit Co.*, 1931 Term No. 3, page 68 U. S. Supreme Court Advance Opinions, 76 L. Ed. The holding in these cases is not authority for the conclusion that under the Revenue Act of 1924 imposing a Federal estate tax, requires inclusion in the gross estate of decedent, decedent's interest in property held jointly by virtue of a joint tenancy created in June, 1915, prior to the passage of the Revenue Acts of 1916 and 1924.

5. The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Lynch v. Congdon et al.*, 1 Fed. (2d) 133. There, as in this case, the joint tenancy involved was created prior to the passage of the Revenue Act of September 8, 1916.

6. The Circuit Court of Appeals for the Tenth Circuit in the case of *Hernandez v. Becker*, 54 Fed. (2d) 542-547, in considering the question whether the wife's interest in community property is an interest held jointly; although dicta, cite *Carter v. English*, supra, and *In re Gurnsey Estate*, supra, as their authority in stating the law on the subject of joint tenancy.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all of the proceedings in this case, numbered on the docket of said Court No. 6489; and that the judgment therein of said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated, San Francisco, California,
March 23, 1932.

Respectfully submitted,
THOMAS A. THATCHER,
FRANK I. FORD,
Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No.

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

This is a proceeding to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit, filed January 5, 1932, found in 54 Fed. (2d) 728. The opinion of said Circuit Court of Appeals affirms the order of the Board of Tax Appeals denying the relief sought by petitioner from a proposed additional assessment of an estate tax. This order

will be found set forth in 20 B. T. A. 1052. Decision promulgated and entered September 30, 1930. Filed March 28, 1931. (Tr. 19.)

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was filed and entered January 5, 1932. (Tr. 40.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 St. 936.)

THE FACTS.

There is no dispute as to the facts. The Board of Tax Appeals found the facts as stipulated by the parties. They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, deceased, and is in actual or constructive possession of the property of the decedent. Decedent died on October 5, 1924, and at the time of her death was a citizen and resident of Petaluma, State of California.

In June, 1915, the decedent and her son, the petitioner, acquired certain property in California as joint tenants, with the right of survivorship and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them.

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held in joint tenancy by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy.

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

SPECIFICATIONS OF ERROR.

The position of the government on the question of law involved in this case has been an inconsistent one and the question is now further complicated by the decision of the Circuit Court of Appeals in the instant case.

The Treasury Department Regulations have not been uniform on the question of law here under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act. On November 23, 1928, Treasury Decision 4248 was promulgated,

amending Regulations 68 (issued under 1924 Act) and Regulations 70 (issued under 1926 Act), providing that the taxing statute did not apply to joint tenancies created before September 8, 1916. But on July 3, 1930, after the decision of the Supreme Court in the case of *Tyler v. United States,* 281 U. S. 497, Treasury Decisions 4293, 4294 and 4295 were promulgated. Treasury Decision 4293 amended Article 27, Regulations 37 (issued under 1918 Act) and Article 23, Regulations 63 (issued under 1921 Act). Treasury Decision 4294 amended Article 22, Regulations 68 (issued under 1924 Act) and Treasury Decision 4295 amended Article 22, Regulations 70 (issued under 1926 Act).

The effect of these decisions was to revoke the earlier ruling and in effect provided that all joint ownerships were subject to the tax regardless of the time when they were created. These regulations are still in effect.

The cases of *Doe Estate,* 18 B. T. A. 427 and *Mastick Estate,* 18 B. T. A. 428, were decided against the Government.

The Board of Tax Appeals followed the law in the case of *Carter v. English* (C. C. A. 9), 15 Fed. (2d) 6, holding the gross estate of the deceased husband does not include California property held in joint tenancy by husband and wife and acquired before the enactment of the first taxing statute.

The appeals taken by the Government, after the decision of *Tyler v. United States,* supra, were dismissed. *Doe Estate,* 18 B. T. A. 427; appeal dismissed

(C. C. A. 9) 48 Fed. (2d) 1071. *Mastick Estate,* 18 B. T. A. 428; appeal dismissed (C. C. A. 9) 48 Fed. (2d) 1071.

The Circuit Court of Appeals for the Ninth Circuit in its opinion in the instant case, now thinks that the case of *Carter v. English,* supra, has been completely overturned by the later decisions of the Supreme Court of the United States.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(a) The Court erred in failing to hold that a joint tenancy, created in June, 1915 prior to the first taxing statute, gave to each tenant a present joint ownership in the whole property, that there was no change in title and no transfer by reason of the death of decedent; that the estate had completely vested prior to the date of the law.

(b) The Court erred in holding that the right accruing to a surviving joint tenant upon the death of his cotenant in a joint tenancy created prior to the first State and Federal taxing statute, accrued by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

(c) The Court erred in failing to hold that a joint tenancy created before September 8, 1916, was not created for the purpose of evading Federal estate taxes.

(d) The Court erred in failing to hold that no interest ceased by reason of death or passed to her son.

(e) The Court erred in failing to hold that here there has been taxed and now a further attempt to tax, an interest in property created, transferred, and vested prior to the first taxing statute and therefore the tax is arbitrary and capricious and violates the due process clause of the fifth amendment.

ARGUMENT.

A.

IN A JOINT TENANCY CREATED PRIOR TO THE FIRST TAXING STATUTE, A JOINT TENANT TOOK HIS WHOLE ESTATE AT THE TIME OF THE CONVEYANCE, AND NO INTEREST COULD BE TAXED UNDER A LAW PASSED AFTER THE CREATION OF THE TENANCY; THAT THE ESTATE HAD COMPLETELY VESTED PRIOR TO THE DATE OF THE LAW.

It is well settled law in the State of California, that in a joint tenancy created prior to August 10, 1915, the effective date of the 1915 Inheritance Tax Amendment, an inheritance tax cannot be imposed upon the interest of a decedent, dying after the passage of that act, for the reason that the *Estate of Gurnsey,* 177 Cal. 211, holds that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the date of the first taxing statute.

The law of California, however, is different with respect to a joint tenancy created subsequent to August 10, 1915.

The Legislature of the State of California amended the inheritance tax law by inserting an entirely new

provision with respect to the taxation of joint tenancies, effective August 10, 1915.

Act 4035 B, Section 1, Subdivision G:

> "When any person or persons, either directly or indirectly created any joint tenancy, joint account, joint deposit, or other interest in any property, whereby any right of survivorship is created between such person or persons and any other person or persons, without valuable and adequate consideration therefor, the creation of such joint tenancy, joint account, joint deposit or other interest in such property, with right of survivorship, shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the person or persons in this paragraph first mentioned, within the meaning of this act." (Amendment approved May 10, 1915. Statute 1915, page 435.)

The Inheritance Tax Amendment of 1915 holds that the creation of a joint tenancy shall be deemed to be a transfer intended to take in possession or enjoyment at or after the death of the person or persons "in this paragraph first mentioned within the meaning of this act."

Here in California we have two well settled rules of law. With respect to a joint tenancy created prior to the first taxing statute, possession and enjoyment passes at the time of the creation of the joint tenancy, and all of the property remains the property of the survivor, as it was, in contemplation of law, from the time of its creation.

With respect to a joint tenancy created subsequent to August 10, 1915, the effective date of 1915 In-

heritance Tax Amendment, the common law rule is changed for the purpose of levying an inheritance tax. The creation of a joint tenancy shall be deemed to be a transfer intended to take effect in possession and enjoyment, not at time of its creation, but at or after the death of the person or persons first mentioned within the meaning of the Act. The right accruing to the surviving joint tenant under the death of his cotenant is made the subject of a tax by this specific legislation. The law does not apply to joint tenancies created prior to August 10, 1915. The estate of M. A. Gwinn, deceased, was not subject to an inheritance tax, as the joint tenancy was created prior to the first taxing statute.

When Congress enacted Section 201 of the Revenue Act of 1916 imposing a tax on the transfer of the net estate of every decedent dying after the passage of this act, the inclusion of a joint tenancy or a tenancy by the entirety could not be justified by the terms of the statute as no transfer takes place at death in a joint tenancy or a tenancy by the entirety according to the common law rule. So it was, therefore, necessary by specific legislation to bring under Section 202 (c) the taxation of decedent's interest in a joint tenancy or tenancy by the entirety. The common law rule was changed by Congress. The interest of the surviving joint tenant or tenant by the entirety was deemed by Congress to accrue not by reason of the transfer, theretofore made which created the joint ownership, but to accrue by reason of the death of the cotenant. Possession and enjoyment was deemed to take effect at or after death. The property rights ac-

cruing to the surviving joint tenant upon the death of his cotenant was deemed by Congress to be the proper subject of an estate tax to be measured in whole or in part by value of such rights. Congress did in September of 1916 the same thing that the State of California did in August of 1915. It changed the common law rule only for the purpose of levying a tax. It taxed the property rights accruing to the surviving joint tenant under the death of the cotenant.

The Supreme Court of California holds that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer. (*Estate of Gurnsey,* supra, citing *Hunt v. Wicht,* 174 Cal. 205.)

When Congress changed the common law rule with respect to possession and enjoyment of a joint tenancy and taxed the property rights accruing to the surviving joint tenant under the death of his cotenant, the tax to be measured in whole or in part by the value of such rights; the statute does not apply to joint tenancies created prior to September 8, 1916, as possession and enjoyment of the whole and the rights accruing to the surviving joint tenant passed at the time title vests in virtue of the transfer.

B.

RIGHTS ACCRUING TO A SURVIVING JOINT TENANT UPON THE DEATH OF HIS COTENANT ARE NOT TAXABLE UNDER FEDERAL STATUTES, IF THE ESTATE VESTS IN VIRTUE OF THE TRANSFER MADE PRIOR TO SEPTEMBER 8, 1916.

The Circuit Court thinks that the law in *Estate of Gurnsey,* supra, is no longer controlling in *Carter v. English,* and *Carter v. English* is overturned by later decisions of the Supreme Court of the United States.

The Circuit Court makes the following holding in the last paragraph of its opinion:

> "The interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924." (54 Fed. (2d) 728-730.)

The above conclusion of law we believe is based upon the following conclusion of the Circuit Court after its discussion of Section 683, Civil Code of California, *Green v. Skinner,* 185 Cal. 435, and *Estate of Gurnsey,* supra.

> "It is made very plain that the California courts do not view a joint tenancy as conferring upon each tenant complete and irrevocable rights in the joint estate from the date of the inception of the relation. Rights not theretofore possessed must then accrue to the survivor upon the death of his cotenant." (*Gwinn v. Commissioner,* 54 Fed. 728, 729.) (Tr. 35.)

The Circuit Court from the above conclusion of law holds that the rights accruing to a surviving joint tenant upon the death of his cotenant, in a joint tenancy created prior to first taxing statute, accrued, by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

Is the above a correct statement of the California law with respect to a joint tenancy created prior to the first taxing statute? We believe this holding to be incorrect. The rights accruing to a surviving joint tenant under the death of his cotenant were not held subject to an inheritance tax, if the joint tenancy was created prior to the first taxing statute. The Supreme Court stated very clearly in the cases of *McDougald v. Boyd,* 172 Cal. 753 (159 Pac. 168), and *Estate of Gurnsey,* supra, that the Inheritance Tax Act of 1911 did not undertake to impose such tax upon the right accruing to a surviving joint tenant upon the death of his cotenant.

> "Some restrictions upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts to bring the transfer within its definitions." (*Estate of Gurnsey,* 177 Cal. 211-216.)

The Inheritance Tax Amendment of 1915 for the first time did place some restrictions upon the possession and enjoyment of the donee. It subjected to inheritance tax the right accruing to a surviving joint tenant upon the death of his cotenant. It changed the common law rule with respect to pos-

session and enjoyment. Possession and enjoyment was now deemed to take effect at or after the death of the cotenant. A transfer was deemed to take place by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

The 1915 Inheritance Tax Amendment, taxing the right accruing to a surviving joint tenant upon the death of his cotenant, has not been applied to joint tenancies created prior to August 10, 1915, in view of the opinion of the Supreme Court of California in *Estate of Gurnsey,* supra, holding that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer, citing *Hunt v. Wicht,* 174 Cal. 205.

The Circuit Court of Appeals rightly held in *Carter v. English,* supra, with respect to a joint tenancy created prior to September 8, 1916, that the cessation of decedent's interest or the right accruing to the surviving joint tenant upon the death of his cotenant, was not subject to estate tax under the Revenue Act of 1916.

> "Our judgment is that the will gave to each tenant a present joint ownership in the whole property described in the will; that there was no change of title; and no transfer by reason of the death of Annie Ames." (*Carter v. English,* 15 F. (2d) 6-8 last paragraph.)

The aforegoing clearly shows that with respect to a joint tenancy created prior to the Inheritance Tax Amendment of 1915 and the Revenue Act of Sep-

tember 8, 1916, the transfer takes place at the time of the creation of the joint tenancy. The right accruing to a surviving joint tenant upon the death of his cotenant is not taxable if the joint tenancy was created prior to the first taxing statute.

The Circuit Court is in error when it states "the interest of petitioner, held subject to the tax, accrued by the reason of the event of the death of the cotenant, and not by reason of the transfer theretofore made which created the joint tenancy."

The above is in direct conflict with the decisions of the Supreme Court of California in the *Estate of Gurnsey,* supra, the case of *Carter v. English,* supra, and *Lynch v. Congdon,* 1 F. (2d) 133, with respect to a joint tenancy created prior to the first taxing statute. The rights accruing to a surviving joint tenant upon the death of his cotenant or the cessation of decedent's interest are not subject to estate taxes if the joint tenancy was created prior to the first taxing statute. To subject it to a tax, Congress can disregard the common law rule with respect to the transfer and vesting of the estate, but it cannot apply the law to tenancies created prior to September 8, 1916.

This Court's attention is called to the fact that the words "held subject to the tax" appearing in 54 Fed. (2d) 728 at 730 last paragraph, do not appear in the opinion of the Circuit Court, Transcript of Record, page 39.

The *Tyler* case, supra, held that the rights accruing to the surviving joint tenant upon the death of

his cotenant were the subject of the tax (Tr. 36), and not the ceasing of the power to transfer and terminate the joint tenancy. According to the opinion in the Federal Reporter the interest of decedent is taxed upon both grounds.

C.

1. **A JOINT TENANCY ESTATE CREATED PRIOR TO SEPTEMBER 8, 1916, WAS NOT CREATED FOR THE PURPOSE OF EVADING FEDERAL ESTATE TAXES. SECTION 201 (c) OF THE 1916 ACT AND THE SIMILAR PROVISION OF SECTION 302 (e) OF THE 1924 ACT WERE ENACTED TO PREVENT TAX EVASION.**

In the case of *Tyler v. United States,* 281 U. S. 497, No. 428, the tenancy by the entirety was created in November 1917, decedent died May 7, 1918. 1916 Act applicable. In No. 546 the tenancy by the entirety was created on June 19, 1923, the decedent died August 28, 1923. 1921 Act applicable. In No. 547 decedent died on February 3, 1924. 1921 Act applicable. The facts in 10 B. T. A. 1100 do not state when the estate by the entirety was created. The Supreme Court states all three estate were created after the applicable act.

The facts in the *Tyler* case, supra, however, were different. The estates by the entireties before the Court in the *Tyler* case were created after the passage of the effective revenue act. Here the joint tenancy was created prior to the first estate tax law; the act of September 8, 1916.

There are several outstanding points in the *Tyler* case which we believe show that the *Tyler* case does not apply to joint tenancies created prior to the first estate tax law.

First. The *Tyler* case did not decide the question at issue in this case as it dealt only with tenancies by the entirety created subsequent to September 8, 1916.

Second. It was intimated very strongly in the *Tyler* case that an estate by the entirety would not come within the purview of the general language of Section 201, Revenue Act of 1916, if that section stood alone, and is subject to tax solely because of the specific provisions of Section 202 (c), Revenue Act of 1916.

Third. Congress recognized the fact that there must be a transfer at death in order to impose a tax under Section 201. According to the common law rule, no transfer took place in a joint tenancy or tenancy by the entirety at death. There being no transfer at death no tax could be imposed upon the interest of decedent in a joint tenancy or tenancy by the entirety.

Fourth. It was, therefore, necessary by specific legislation to bring under Section 202 (c) the taxation of decedent's interest in a joint tenancy or tenancy by the entirety. Under Section 202 (c) Congress disregarded the common law rule and subjected to tax the rights accruing to the surviving joint tenant upon the death of his cotenant to be measured in whole or in part by the value of such rights. Congress did in 1916 what the legislature of California did in 1915.

For the purpose of levying a tax it was deemed that the interest of the surviving joint tenant accrued by reason of the death of his cotenant and not by reason of a transfer theretofore made which created the joint tenancy.

Fifth. This Court stated in the opinion that the decisions of the Courts of Maryland and Pennsylvania follow the common law rule and are in accord in respect to the character and incidents of tenancies by the entirety.

> "These decisions establish a state rule of property, by which, of course, this court is bound." *Warburton v. White,* 176 U. S. 484, 496, 205 S. Ct. 404, 44 L. Ed. 555.

The common law rule, adhered to in Pennsylvania and Maryland, that no interest in property held by tenants by the entirety passes to the other upon the death of his cotenant, was not considered to be binding as the tenancies by the entirety were created subsequent to September 8, 1916.

There is nothing invalid in taxing this shifting of economic benefits because it occurred *after* Congress had enacted that such a transaction would be subject to tax. The decision was limited to tenancies created after the passage of the taxing act.

Sixth. The following conclusion of this Court is most important, when considering the instant case.

> "The evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the

> property, or whose separate funds had been used to procure it and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

Section 202 (c) was enacted to prevent an avoidance of estate taxes by means of the creation of tenancies by the entirety or joint tenancies. If this be true, the statute does not apply to joint tenancies created prior to September 8, 1916, as it is obvious that one cannot be charged with attempting to avoid an estate tax that was not in existence when the joint tenancy was created.

> "Finally, the purpose of Sec. 402 (d), supra, is to prevent tax evasion (Phillips v. Dime Trust & Safe Dep. Co., ... U. S. ....., decided November 23, 1931), and it cannot be seriously contended that community estates are created to avoid federal taxation." *Hernandez v. Becker,* 54 Fed. (2d) 542-549.

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2. IF THE JOINT TENANCY ESTATE IS CREATED SUBSEQUENT TO SEPTEMBER 8, 1916, THE ESTATE TAX IS RIGHTLY LAID. IF THE JOINT TENANCY ESTATE IS CREATED PRIOR TO SEPTEMBER 8, 1916, THE TAX IS WRONGLY LAID.

The case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, was decided on November 23, 1931. Petitioner's brief was submitted to the Circuit Court prior to November 14, 1931; this case was therefore not considered in the brief, but reference was made to it in the oral argument.

In the *Phillips v. Dime Trust & Safe Deposit Co.* case, supra, the thirteen items of property with respect to which the tax was imposed may be classed in three groups, (1) property held upon tenancies by the entirety created after the effective date of the Revenue Act of 1924, (2) property held upon tenancies by the entirety created after the Revenue Act of 1916 and before the effective date of the Revenue Act of 1924, and (3) bank accounts opened in 1910 in the joint names of decedent and his wife, in which there were deposit balances at the date of his death.

The opinion with respect to Group 3 is of vital importance with respect to the question of law involved in this case. The following is the opinion of the Court with respect to Group 3:

> "Group 3. Although the bank accounts were opened before the passage of the Revenue Act of 1916, the record does not disclose whether the deposits, which were the sources of the credit balances at the time of the decedent's death, were made before or after 1916. If after, the tax was rightly paid, for reasons already stated which support the tax with respect to the items in Group 2."

What are the principal reasons that support the tax with respect to Group 2, referred to in Group 3 of the opinion?

They are as follows: The law in the *Tyler* case and

> "The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as dece-

> dent's estate, relieves the present tax of the objection that it is arbitrarily retroactive." (*Phillips v. Dime T. & S. D. Co.,* supra, Group 2.)

The only conclusion that can be drawn from the above citation is, a tax is arbitrarily retroactive when it is applied to joint tenancies created prior to September 8, 1916. As Section 302, Subdivision (h) of the Revenue Act of 1924 was under consideration with respect to Group 2, therefore, Subdivision (h) is arbitrarily retroactive, when it includes under Subdivision (e) the value of decedent's interest in a joint tenancy created prior to September 8, 1916. If arbitrarily retroactive it offends the Fifth Amendment.

With respect to Group 3, the Court states:

> "If after, the tax was rightly laid, for reasons which support the tax with respect to the items in Group 2."

We have shown the reasons that support the tax with respect to Group 2 apply to Group 3 if the joint estate was created subsequent to September 8, 1916. The holding with respect to Group 3 may be summed up in the following words:

Joint bank accounts created in 1910 are subject to tax where no proof is submitted as to joint deposits outstanding which were made before 1916 Act, and the tax is rightly laid.

The only conclusion that can be drawn from the Court's opinion with respect to Group 3, is that the tax is wrongly laid, if it is shown that the joint tenancy was created prior to September 8, 1916, as

the rights of the parties were vested, as has been shown in this case.

D.

NO INTEREST CEASED BY REASON OF DEATH.

The theory is advanced that it was within the power of the decedent to terminate or transfer the interest in the joint estate, and that power ceased by reason of death and only because of that event. Hence it was taxable.

The three cases in which it was held that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death are:

Saltonstall v. Saltonstall, 276 U. S. 260;
Chase National Bank v. United States, 278 U. S. 327, and
Reinecke v. Northern Trust Co., 278 U. S. 339.

In all the cases cited above it was held that the estate of decedent was taxable, as decedent in his lifetime had exclusive control of the property or trust in question. The trusts were all revocable trusts. The insurance policies were subject to full control of the assured.

These cases are not comparable and do not control with respect to a joint tenancy created prior to the first taxing statute. Revocable trusts controlled by the settlor alone are not in the same category as joint tenancies subject to a joint control.

As was pointed out in *Reinecke v. Northern Trust Co.*, supra:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

J. H. Gwinn was the only son of decedent and her sole heir at law. The joint tenancy was under his control and management. The only way decedent could terminate the joint tenancy without the consent of her son was by a suit for partition. It is true she might convey her interest to a third party as a gift or for a valuable consideration, but it would be against his and her interests. She was about 86 years old at the time of her death. The interest of the son under this holding of law would be an adverse interest, and for all practical purposes the interest of decedent had passed at the time of the creation of the joint tenancy as if the transfer had been absolute.

Under the facts in this case it is unreasonable to assume that the power to transfer or terminate would ever have been exercised. This contention is not a reasonable one.

One cannot compare a sole tenant with a joint tenant. The sole tenant has exclusive control of his property, a joint tenant is subject to a joint control. A sole tenant is the opposite of a joint tenant. The rule laid down in the three cases cited above applies

only to a sole tenant or settlor with exclusive control of his property or the revocable trusts. The joint tenancy interests of M. A. Gwinn, deceased, were different.

The failure of decedent during her lifetime to give her interest away and thereby sever the joint tenancy and avoid an estate tax, or the failure of decedent to bring an action to partition her son's interest, which would be to her financial detriment and her son's financial detriment; the ceasing of the power to do these things, it is contended is the proper subject of a tax.

In other words a taxpayer must avoid a tax by giving her property away or injure herself financially by severing her joint interest, else her estate is liable for a tax. Such a line of reasoning is illogical when applied to the instant case, as the law does not contemplate that a person must injure oneself in order to comply with the law and do something that is against one's best interest not to do, in order to evade or avoid a tax.

The reason for the rule in *Chase National Bank, Reinecke* and *Saltonstall* cases, supra, is that the sole tenant or settlor had exclusive control of the property or the power to revoke the trusts. In these cases possession and enjoyment of the property by the beneficiaries took place at or after death, hence the estates were taxable.

In the instant case possession and enjoyment of the whole took place in June, 1915, prior to the date of the first taxing statute.

When Congress passed the Revenue Act of 1916 it should have stated in the Act that, if joint tenants who created their joint tenancies prior to September 8, 1916, did not give away their interests or terminate their tenancies by a suit for partition, the interest of a decedent in a joint tenancy created before the Act but dying after the Act would be held subject to a tax.

> "A taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess at the outcome of pending measures." *Untermeyer v. Anderson,* 278 U. S. 440.

There is another reason why the joint estate here involved is not taxable. No estate passed or transferred upon the death of M. A. Gwinn. On the contrary her interest in the joint tenancy upon her death ceased and terminated, and the whole of the joint estate, by virtue of the statute, and the conveyance or transfer of the property to the joint tenancy, belonged to, rather than passed to her son. At the death of M. A. Gwinn no interest in the joint tenancy held by her passed to her son, title thereto having become definitely fixed by the joint tenancy deeds in June of 1915.

The interest which she held immediately prior to her death was obliterated by that event. (*May v. Heiner,* 281 U. S. 238-243.)

The interest of decedent that ceased at death was taxable, was the theory urged by the Government in the case of *Lynch v. Congdon,* 1 Fed. (2d) 133, but it

was not followed by the Eighth Circuit Court of Appeals for the reason that the joint tenancy:

> "gave her (Clara B. Congdon) a present joint ownership of the funds represented by the certificates and the right of sole ownership if she survived him. This transaction was complete before the passage of the act. Unless the act providing for such tax is retrospective in its operation, the tax assessed and collected was invalid. The Supreme Court settled this question as to this very act in Schwab v. Doyle, 258 U. S. 529."

E.

AN ATTEMPT TO TAX AN INTEREST, CREATED, TRANSFERRED, AND VESTED PRIOR TO THE FIRST TAXING STATUTE, IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Board of Tax Appeals in its decision concludes that in all of the cases (including the instant case) the joint tenancies involved were created, and the titles of the decedents, whose estates were sought to be taxed, were vested, prior to the enactment of the applicable act. (Tr. 15.)

The Circuit Court of Appeals holding that title of petitioner was not vested is in conflict on this point, with the decision of the Supreme Court of California in the case of *Estate of Gurnsey,* 177 Cal. 211-216.

According to the law in the cases of *Estate of Gurnsey,* supra, *Carter v. English,* supra, and *Lynch v. Congdon,* 1 Fed. (2d) 133, the joint tenancies did vest in the survivors prior to the first taxing statute.

The following is applicable here:

> "We see no escape from the conclusion that the interest of the surviving wife, as it is finally determined by the Supreme Court of California, is of a nature that renders it subject to taxation under the plain terms of the Federal Revenue Act." *Talcott v. United States* (C. C. A. 9), 23 Fed. (2d) 897 at 901.

We see no escape from the conclusion that the interest of a decedent in a joint tenancy created prior to first taxing statute, as it is finally determined by the Supreme Court of California, is of a nature that renders it not subject to taxation under the plain terms of the Revenue Act.

The real question at issue in this case is whether Section 302 (h) of the Revenue Act of 1924 is applicable to all joint tenancies whether they are created "before or after the enactment of this Act" and does the application of the Act to joint tenancies created prior to September 8, 1916, violate the "due process" clause of the Fifth Amendment.

The Circuit Court of Appeals avoided this question by holding that "the interest of petitioner held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is therefore present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924."

Did the interest of petitioner accrue by reason of the transfer in 1915 or did it accrue by reason of the

death of his cotenant in 1924? The arguments submitted under Sections A and B clearly show that with respect to a joint tenancy created prior to the first taxing statute, the rights accruing to a surviving joint tenant upon the death of his cotenant are not subject to a tax, for the reason that the interest of the surviving joint tenant accrued by reason of the original transfer and not by reason of the death of his cotenant.

This tax is arbitrary and so capricious so as to offend the Fifth Amendment for the following reasons:

When the decedent used her funds to create a joint tenancy with her only son, she, for all practical purposes, made a gift, as fully as if made outright. She was about 77 years old in 1915 and her life expectancy was limited. Her only son was her sole heir at law. The management and control of the property was in the hands of her son. The property rights of the parties having become fixed by reason of the original instrument creating the estate. The joint tenancy was created, transferred, and vested in the survivor prior to September 8, 1916, and that act was consummated before the first taxing statute was passed.

The full legal title vested in the survivor in June of 1915. This is the crucial point in this discussion. The death of petitioner's cotenant in 1924 resulted in no new title or right, but merely relieved petitioner from the further interference of his cotenant. The

transfer in the instant case was fully completed in June, 1915, and was subject to no tax. Yet the value of decedent's interest in that completed transfer, is computed as a part of the estate, and taxed as a transfer in 1924. Hence it follows that the validity of Section 302 (h) Revenue Act of 1924, as applied to this completed transaction cannot be upheld. It is a deprivation of property without due process of law.

The general principle that laws are not to be considered as applying to cases which arose before their passage is held in the case of *Lewellyn v. Frick et al.,* 268 U. S. 238.

All of the foregoing argument, with the citations of law prove one thing: That here there is an attempt on interest that was vested prior to the Revenue Acts of 1916 and 1924 and which interest accrued by reason of the transfer made in June, 1915, prior to the date of the first taxing statute of September 8, 1916.

The following are important cases relating to the question of retroactive operations of estate tax statutes.

Transfer—1916 Act. *Schwab v. Doyle,* 258 U. S. 529, held that the Act was not retroactive as to transfers prior to the first taxing statute in the absence of an express provision.

Insurance—1918 Act. *Lewellyn v. Frick,* 268 U. S. 238. Held that the insurance clause was not retroactive in the absence of a specific provision because constitutional doubts must be avoided.

Transfer—1918. *Nichols v. Coolidge,* 274 U. S. 531. Held that the express retroactive provisions as to transfers in the 1918 Act are invalid, because the construction was arbitrary, unreasonable and not justified by the Act.

We again repeat that it is the creation of the joint tenancy prior to the first taxing statute that determines the rights of the parties and by local law all property rights arise by reason of that instrument and through it. On this question the statutes and rules of decision in California, where the decedent's property is located are controlling. (*De Vaughn v. Hutchinson,* 165 U. S. 566, 17 Supt. Ct. 461.)

This Court has consistently placed its stamp of disapproval on retroactive construction of estate tax statutes save in cases where no other construction was open, owing to the peculiar nature of the estate tax law. Where it appears that a rule of law has been in effect for several hundred years holding that the title of the surviving joint tenant vests at the time of the original grant and not by reason of the death of his cotenant, a change in this rule for the purpose of levying estate taxes, cannot justifiably be applied to joint tenancies created prior to the first taxing statute.

We submit that the matters which have been set forth in the foregoing brief justify, and in fact require, that this Honorable Court grant the accompanying petition for a writ of certiorari, and that upon the hearing of said matter that the decision of

the Circuit Court of Appeals for the Ninth Circuit, affirming the order of the Board of Tax Appeals, be reversed.

Dated, San Francisco, California,
March 23, 1932.

Respectfully submitted,
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